RE CHIN SEM LIN'S SETTLEMENT YONG TET FOONG & ANOR. v. CHIN THIN LEE & ORS.

[O.C.J. (Chang Min Tat J.) May 28, 1971]

[Ipoh — Originating Summons No. 510 of 1970]

Wills and Trusts — Settlement — Part of income from trust property to provide for settlor's sons, adopted sons, grandsons and adopted grandsons — Construction of — Whether offended the rule against perpetuities.

Equity and Trusts — Settlement — Part of income from trust property to go towards maintenance of ancestral graveyard in China — Pre-condition imposed — Whether gift failed by reason of impossibility of performance or failure of object.

Practice and Procedure — Application for construction of a deed of settlement — R.S.C., 1957, O. 54A, r. 1.

This was an application for the construction of a deed of settlement executed by the settlor on June 12, 1929, to provide for his sons, adopted sons, grandsons and adopted grandsons. All female children were excluded. There were 2 clauses in this deed of trust which were of concern in this construction. Clause 7, which dealt with the distribution of the income from the trust, was as follows: "7. After the property described by the settlor under his will shall have been distributed as therein directed, after paying the foregoing amounts under clause 5(a)-(h) hereof the nett income arising from the trust property shall be paid by the trustees as follows: (1) Ten (10%) per cent thereof shall be paid by the trustees for charitable objects and purposes as they in their discretion shall think fit, and any balance shall form part of the residuary trust property. (2) Thirty (30%) per cent thereof shall be remitted by the trustees to the managing trustee of Ken Huin Kongsi, Moyang or Swatow, in China. If Moyang or Swatow shall not be peaceful, this money shall not be sent, but shall be invested in Ipoh or Penang on first class landed security until such time as Moyang or Swatow shall be peaceful. (3) Sixty (60%) per cent thereof shall be paid to and divided amongst the sons, adopted sons and grandsons and the sons of grandsons of the settlor and who shall either be living at the time the property directed by the settlor's will shall be distributed or who shall be born thereafter, in equal shares, share and share alike, should any of the sons, adopted sons, or grandsons living at the time and the said income is distributed as aforesaid be aged 30 years and have no male issue he may adopt for the purpose of receiving a share in the said sixty (60%) per cent income one son who shall then be entitled to receive a share in the said income. Should any son of the settlor have two (2) sons such son shall not be entitled to adopt any more sons. All female children shall be excluded from any interest or share in the trust property or income."

Sub-clauses (a)-(h) of clause 5 provided for the payment of specific sums to specified children under certain circumstances for educational purposes. The determination of the trust and the distribution of the trust property were provided for in clause 13 which read: "13. The corpus of the trust property and residuary trust property shall be converted and turned into money by the trustees at the time when the youngest of the said grandsons or adopted grandsons of the settlor shall have attained the age of twenty-one (21) years when out of the said money arising from such conversion, forty (40%) per cent thereof shall be paid to Ken Huin Kongsi in Moyang or Swatow, China, and the balance of sixty (60%) per cent thereof shall be paid to and distributed by the trustees amongst the said sons, adopted sons, grandsons and sons of adopted son of the settlor who shall then be living in equal shares share and share alike. All female children shall be excluded from any share in the trust property."

In his last will and testament executed by him on October 11, 1934, for which probate had been granted, the settlor, in clause 47, directed his trustees to distribute his residuary estate within 4 years from the date of his death. The settlor died on June 13, 1938.

The main issues were whether the provisions as to 60% of the trust property did or did not offend against the perpetuity rule and whether the provision as to the remaining 40% did not fail by reason of impossibility of performance or failure of object.

Held: (1) the distribution of the income as set out in clause 7 was according to the provisions thereof for the period commencing 4 years from the death of the settlor to the determination of the trust, and in so far as the 60% thereof was concerned, was extended among others to those grandsons who were not living at the creation of the trust but were born thereafter, if effect was to be given to this part of the clause. As for the "thereafter" in clause 7, it was possible that the reference was restricted to those born up to the date of the death of the settlor, the reason being that the trust deed appeared to have been made to tie up with the will by the reference in the former to the latter and the two documents should be read together to determine the scope of any one of them. In the will, the testator made clear provisions for shares in his residuary estate to be given to the sons born after the execution thereof but not for any grandsons born or adopted thereafter. Therefore, there was no infringement of the rule against remoteness of vesting, and therefore the trust was valid and vested when the youngest grandson or adopted grandson living at the execution of the trust attained the age of 21 years;

(2) as regards the 40% of the trust property to be paid to Ken Huin Kongsi in Moyang or Swatow, China, being the ancestral graveyard in the political situation now existing and having regard to the fact that no members of the settlor's family resided in China, it was clear that the trust had failed. No one had been able to advise that the graveyard was being maintained. Thus, this portion fell into the residuary estate of the settlor to be distributed in accordance with the terms of the will.

Cases referred to:-

(1) *Smidmore* v. *Smidmore* (1905) 3 C.L.R. 344.

(2) *Pearks* v. *Moseley* (1879-1880) 5 App. Cas. 714 at p. 719.

ORIGINATING SUMMONS.

Dato' Yeoh Cheang Lee for the applicant.

Peh Swee Chin for the respondents 15, 17, etc.

Lim Kean Chye (*M. Sivalingam* with him) for respondent 16.

Cur. Adv. Vult.

Chang Min Tat J.: This is an application under the provisions of O.54A r.1 Rules of the Supreme Court for the construction of a deed of settlement, the main issues being whether the provision as to 60% of the trust property did or did not offend against the perpetuity rule and whether the provision as to the remaining 40% did not fail by reason of impossibility of performance or failure of object.

A first point was taken, in my view, validly, by Mr. Lim Kean Chye for one of the respondents, whether the application could be considered by me in the absence of the original document. In anticipation of this objection, the trustee-applicants had filed an affidavit explaining that the original deed was lost in the looting consequent on the military invasion of this country by the Japanese. This explanation is in my view reasonable and there is no reason to hold that it was not the truth. The document relied on was taken from the copy deposited in accordance with the statutory provisions relating to the registration of deeds at the Registry of Titles for the State of Perak. At the time of the deposition, the registry was at Taiping.

It had since been removed to Ipoh, which rather facilitated the matter.

In order to settle any doubts in the matter, I called for a personal inspection of the copy deposited. It was, as was the practice in those early days before the typewriter became of universal use, written by hand and though designated a copy, was duly signed and attested and stamped. I could not have sight before the hearing, but it was on the understanding with counsel that if I should find any discrepancy with the copy relied on, I was to call for further hearing. I had inspection with Mr. Sivalingam who appeared with Mr. Lim Kean Chye, and both he and I are entirely satisfied that the copy in the hands of the trustees is a true copy of the deed of trust.

Now as to the background of the settlement: The settlor a man of considerable means and great consideration for the welfare of his numerous progeny after his death had on 12th June 1929 executed a deed of trust to provide for his sons, adopted sons, grandsons and adopted grandsons. All female children were excluded. There are 2 clauses in this deed of trust which are of concern in this construction.

Clause 7 which deals with the distribution of the income from the trust is in these words:

> 7. After the property described by the settlor under his will shall have been distributed as therein directed, after paying the foregoing amounts under clauses 5(a)-(h) hereof the nett income arising from the trust property shall be paid by the trustees as follows:—
>
> (1) Ten (10%) per cent thereof shall be paid by the trustees for charitable objects and purposes as they in their discretion shall think fit, and any balance shall form part of the residuary trust property.
>
> (2) Thirty (30%) per cent thereof shall be remitted by the trustees to the managing trustee of Ken Huin Kongsi, Moyang or Swatow, in China. If Moyang or Swatow shall not be peaceful, this money shall not be sent, but shall be invested in Ipoh or Penang on first class landed security until such time as Moyang or Swatow shall be peaceful.
>
> (3) Sixty (60%) per cent thereof shall be paid to and divided amongst the sons, adopted sons and grandsons and the sons of grandsons of the settlor and who shall either be living at the time the property directed by the settlor's will shall be distributed or who shall be born thereafter, in equal shares, share and share alike, should any of the sons, adopted sons or grandsons living at the time the said income is distributed as aforesaid be aged 30 years and have no male issue he may adopt for the purpose of receiving a share in the said sixty (60%) per cent income one son who shall then be entitled to receive a share in the said income. Should any son of the settlor have two (2) sons such son shall not be entitled to adopt any more sons. All female children shall be excluded from any interest or share in the trust property or income.

Sub-clauses (a)-(h) of clause 5 provide for the payment of specific sums to specified children under certain circumstances for educational purposes.

The determination of the trust and the distribution of the trust property are provided for in clause 13 which reads:

> 13. The corpus of the trust property and residuary trust property shall be converted and turned into money by the trustees at the time when the youngest of the said grandsons or adopted grandsons of the settlor shall have attained the age of twenty-one (21) years when out of the said money arising from such conversion, forty (40%) per cent thereof shall be paid to Ken Huin Kongsi in Moyang or Swatow, China, and the balance of sixty (60%) per cent thereof shall be paid to and distributed by the trustees amongst the said sons, adopted sons, grandsons and sons of adopted sons of the settlor who shall then be living in equal shares share and share alike. All female children shall be excluded from any share in the trust property.

In his last will and testament executed by him on 11th October 1934, for which probate had been granted, the settlor in clause 47 thereof directed his trustees to distribute his residuary estate within 4 years from the date of his death. There were two codicils to this Will but they merely provided for specific legacies and did not in any way alter the date of distribution.

The settlor died on 13th June 1938.

From the genealogical table so thoughtfully provided by the solicitors for the trustees, it is ascertained that at the time of the execution of the trust-deed the settlor had living then 7 natural sons, 2 adopted sons, 1 adopted grandson and 3 natural grandsons and I am advised from the Bar that the adopted grandson was a boy adopted by or for an adopted son who had died before the creation of the trust.

At no time after 1929 did the settlor father any other son or adopt any other male child. The class of sons or adopted sons was thus conveniently closed.

The class of grandsons is however not of such convenience, as having regard to the ages of the sons, they can presumably still father more grandsons for the settlor. In point of fact, 5 more grandsons were born to sons between the creation of the trust and the death of the settlor and they escaped mention in the will by reason of their birth after the execution of the will. Also between the death of the settlor and the date of the distribution of the estate specified in the will, 4 more grandsons were born and 2 were adopted to represent a natural son who had died and an adopted son who is childless.

These two adoptions have the effect of closing the class of adopted grandsons since at all stages up to the present moment, the sons or adopted sons are represented by grandsons or adopted grandsons under the provisions of the will.

After the date of distribution in the will, 9 more grandsons were born, the youngest of whom was born in 1956. None was born after 1956, but the possibility cannot be excluded.

To revert now to the deed of trust: It was tentatively suggested by Mr. Lim Kean Chye that clause 7 conflicted with clause 13. In a sense it does, as there must on a reading appear to be some difference between those who enjoyed the income and those who became entitled to a share in the corpus. But with respect, the conflict is in my view more apparent than real. There can be no objection which I can reasonably see why a settlor should not so provide. The matter of construction however is not without difficulty and as I see it, the difficulty lies in the reference in clause 7 to "who shall be born thereafter" which in the context must qualify sons, adopted sons and grandsons and sons of adopted grandsons but which, in relation to the factual closing of the classes of sons and

adopted sons and adopted grandsons must refer to natural grandsons only. And that class has, as has been observed, not yet closed.

If therefore the determination of the trust in clause 13 set at "the time upon the youngest of the said grandsons or adopted grandsons of the settlor shall have attained the age of 21 years" is dependent upon the closing of the class of grandsons and a period of 21 years thereafter, then clearly the provision for the duration of the trust would be in violation of the rule against perpetuities as being for a period extended to lives not in being. This must be the result if the "said" in clause 13 referred to the grandsons who should be born thereafter.

Dato Yeoh Cheang Lee for the trustees however suggested that there was no offence against the rule on the possible and reasonable reading of clause 13 to mean that the settlement came to an end when the youngest of the said grandsons or adopted grandsons of the settlor living at the date of the settlement reached the age of 21 years. This involved either deletion of the adjective "said" in clause 13 or a reading that the word did not refer to the as yet unborn grandsons in clause 7.

In matters of construction, that the court can reject words that have no meaning there can be no doubt. Mr. Lim Kean Chye had with his usual diligence supplied me with the report of *Smidmore* v. *Smidmore*[1] and drawn my attention to a pertinent paragraph at page 354:

"The duty of the court in construing a will is to ascertain if possible what the testator meant, without preconceived ideas as to his meaning and to give effect as far as possible to his intention as declared in the will....

It is a well-known rule that where words in a will are otherwise not sensible or seem to be incongruous or irreconciliable with plain provisions, they may be rejected."

Now the trust deed in question was drafted by a solicitor who in his lifetime was rightly regarded as an experienced draftsman. There is therefore no reason that the words used were not meant to mean what they said but this is not to say that the rule of surplusage or of incongruity cannot in a proper case be applied. This is particularly so where a draftsman becomes, as very possibly in this case, with words as "aforesaid" or "said" which by constant use soon lose their particular qualification or purpose and become employed more in a rhetorical sense than for any practical purpose. To consider otherwise would perhaps be to suggest that this experienced draftsman did not know of the rule against perpetuities.

I consider it reasonably clear that the distribution of the income as set out in clause 7 is according to the provisions thereof for the period commencing 4 years from the death of the settlor to the determination of the trust and insofar as the 60% thereof is concerned is extended among others to those grandsons who were not living at the creation of the trust but were born thereafter, if effect is to be given to this part of the clause. As for the "thereafter", it is possible, perhaps, that the reference was restricted to those born up to the date of the death of the settlor. The reason for this possible view could be that the trust deed appeared to have been made to tie up with the will by the reference in the former to the latter and the two documents should be read together, where necessary, to determine the scope of any one, and that in the will, the testator who was careful enough to enumerate, *inter alia*, all his sons, adopted sons, grandsons and adopted grandsons made clear provisions for shares in his residuary estate to be given to the sons born after the execution thereof but not for any grandsons born or adopted thereafter.

Dato Yeoh Cheang Lee's contention that the said sons, adopted sons, grandsons and adopted grandsons in the first part of clause 13 must necessarily refer to those living at the date of the execution of the trust instrument arose from the necessity of saving the instrument, on the principle of interpretation *Ut magis res valeat quam pereat*. The suggestion was of course that the "said" in clause 13 was more rhetorical than meaningful.

On the other hand, there could be a meaning and a reference to the "said" in clause 13. Clause 5 which clearly precedes clause 7 makes provision for specific sums for sons or adopted sons or grandsons or sons of adopted sons for educational purposes at secondary level and beyond (daughters and remoter female issues qualifying only for primary education) but there is no provision for or reference to grandsons who shall be born thereafter.

On the whole, I rather prefer the construction that puts a meaning to the word "said" in clause 13 to one that would treat it as surplusage. It is more in accord with the ordinary principles of construction and with the following *dicta* in the speech of Lord Selborne L.C. in *Pearks* v. *Moseley*[2] at page 719:

"The rule which has always been applied to cases of remoteness is this: You do not import the law of remoteness into the construction of the instrument, by which you investigate the expressed intention of the testator. You take his words and endeavour to arrive at their meaning, exactly in the same manner as if there had been no such law, and as if the whole intention expressed by the words could lawfully take effect. I do not mean, that, in dealing with words which are obscure and ambiguous, weight, even in a question of remoteness, may not sometimes be given to the consideration that it is better to effectuate than to destroy the intention: but I do say, that, if the construction of the words is one about which a court would have no doubt, though there was no law of remoteness, that construction cannot be altered or wrested to something different, for the purpose of escaping from the consequences of the law."

and at page 722:

"That question has always been investigated by looking to the state of things as it was at the testator's death."

Read in the way I have, with respect, suggested, there is no infringement of the rule against remoteness of vesting. There is, so far as I can see, no reason why the word "said" in clause 13 should refer to clause 7 and not clause 5.

I therefore hold that the trust is valid and vests when the youngest grandson or adopted grandson living at the execution of the trust attains the age of 21 years. The youngest of such grandson being Chin Yoong Kong born in 1928, the trust vested in 1949. In consequence, all the sons, adopted sons and grandsons and

adopted grandsons living 21 years after the birth of Chin Yoong Kong will share in the distribution of the corpus. The exact date of birth not having been given, an enquiry will have to be made whether Chin Kee Kong who was born in 1949 comes within the period of 21 years, but this can ordinarily be done by the trustees without reference to court. Chin Fee Kong, born in 1952 and Chin Chee Kong born in 1956, are unfortunately out, but the only comfort, though a cold comfort for them, is that they are the only two of the settlor's progeny who do not benefit.

As for the 40% of the trust property to be paid to Ken Huin Kongsi in Moyang or Swatow, China, which I am given to understand is an ancestral graveyard, in the political situation now existing and having regard to the fact that no members of the settlor's family are residing in China, I think it is clear and beyond argument that the trust has failed. No one has been able to advise that the graveyard is being maintained. This portion thus falls into the residuary estate of the settlor to be distributed in accordance with the terms of the will.

I believe I have answered the questions posed in this summons. There will be a declaration for the execution of the trust as herein determined. Costs of all parties to this application to be taxed as between solicitor and client basis and paid out of the trust fund.

In conclusion, let me express my gratitude to all concerned for their assistance in this difficult determination.

Order accordingly.

Solicitors: *Cheang Lee & Ong; Peh Swee Chin; Lim Cheng Ean & Co.*

DE FONSEKA v. DE FONSEKA & ORS.

[O.C.J. (Yong J.) June 4, 1971]

[Kuala Lumpur — Originating Summons No. 386 of 1970]

Wills and Trusts — Trust deed — Infant's beneficial interest of ¼ undivided share in land and house — Application by one co-owner for an order to sell whole of property and distribute proceeds to owners of respective shares — Whether court can act in direct contradiction of express terms of the trust — Trustee Ordinance, 1949, ss. 2, 26, 56 and 57.

This was an application for permission to sell the immovable property of an infant *cestui que trust* (¼ undivided share in the land and house), contrary to the provisions of the trust deed under which the second respondent became the trustee. The applicant and the first and third respondents were the owners of the remaining undivided ¾ share. This application was not made by the trustee of the infant's property nor by a person beneficially interested under the trust. It was made by the eldest brother of the infant and one of the co-owners of the land who was anxious to sell his ¼ share. He wanted to sell the whole piece of land at a price of "not less than $35,000" and the proceeds distributed to the owners of the respective shares. He also wanted the infant's share of the proceeds to be held by him jointly with the infant's mother and trustee until the infant reaches the age of 21 years.

The question in issue was whether the court could act in direct contradiction of the express terms of the trust.

Held, dismissing the application: (1) as a general rule, the court would give effect to the intentions of the author of the trust as expressed in the trust instrument and would not arrogate to itself any jurisdiction or overriding powers to disregard or re-write the trust;

(2) there was no provision in the trust instrument nor was there any order of court directing the infant's land to be sold. The trust instrument expressly required the land to be transferred to the infant and directed it to be registered in her name on her attaining the age of majority;

(3) the power conferred by section 26 of the Trustee Ordinance, 1949, applies only so far as a contrary intention is not expressed in the trust instrument and has effect subject to the provisions expressed therein. Thus, the instant application did not fall within the four corners of section 26 because a contrary intention was expressed in the trust deed.

Observations on powers of court to vary express terms of a trust instrument.

Cases referred to:-

(1) *Johnstone* v. *Baber* 8 Beav. 233; 50 E.R. 91.

(2) *D'eyncourt* v. *Gregory* (1876) 3 Ch. D. 635.

(3) *In re Crawshay* 60 L.T.R. 357.

(4) *In re Morrison* [1901] 1 Ch. 701.

(5) *In re New* [1901] 2 Ch. 534.

(6) *In re Tollemache* [1903] 1 Ch. 955.

(7) *Chapman* v. *Chapman* [1954] A.C. 429.

(8) *In re Chapman's Settlement Trusts* [1953] 1 Ch. 218.

ORIGINATING SUMMONS.

V. Manuel for the applicant.

Other parties unrepresented at the hearing.

Cur. Adv. Vult.

Yong J.: This is an application for permission to sell the immovable property of an infant *cestui que trust* (¼ undivided share in the land and house), contrary to the provisions of the trust deed under which the second respondent became the trustee. The applicant and the first and third respondents are the owners of the remaining undivided ¾ share.

It must be pointed out that this application was not made by the trustee of the infant's property nor by a person beneficially interested under the trust. It was made by Eric William Anthony De Fonseka the eldest brother of the infant and one of the co-owners of the land who is anxious to sell his ¼ share. Under the National Land Code he is entitled to sell his own share separately, to a purchaser of his own choice and at a price of his own volition. For reasons best known to himself he now applies to sell the infant's share as well. He wants to sell the whole piece at a price of "not less than $35,000" and the proceeds distributed to the owners of the respective shares. He also wants the infant's share of the proceeds to be held by him jointly with the infant's mother and trustee until the infant reaches the age of 21 years.

The land is freehold situated in Petaling Jaya Gardens near the town of Petaling Jaya and has an area of nearly 1/5 of an acre or 8,099 square feet. Erected on it is a large two storey brick house. The house is in good condition and fetches a monthly rental of $350. Applicant has obtained from Mr. Marks a valuation certificate dated July 20, 1970, valuing the land at $20,247.50, that is at the rate of only $2.50 per square foot for land which is situated in one of